



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1079

MRS. BETTY POPE
Petitioner,

versus

CITY OF ATLANTA, WILLIAM A. HEWES,
as Assistant Director of the Bureau of Buildings
of the City of Atlanta, STATE OF GEORGIA and
ATLANTA REGIONAL COMMISSION,
Respondents

BRIEF OF ATLANTA REGIONAL COMMISSION
IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

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On January 5, 1979, Mrs. Betty Pope's Petition For a Writ of Certiorari in the above-referenced case was docketed in the Supreme Court of the United States. Mrs. Pope has requested that this Court issue a writ to review the judgment of the Supreme Court of Georgia which was entered in this case on September 27, 1978, and is officially reported at 242 Ga. 331. The Atlanta Regional Commission (ARC), respondent herein, is opposed to this petition for two reasons. First and foremost, this Court lacks jurisdiction over the issues raised by petitioner and decided adversely to her by the Supreme Court of Georgia. Additionally, ARC submits that, should the Court decide that it has jurisdiction over this matter, the writ nevertheless should not issue for the reason that this case is clearly controlled by a case only recently decided by this Court.

ARGUMENT

I. The Court Lacks The Jurisdiction Necessary To Grant a Writ of Certiorari In This Case.

Pope claims that the Supreme Court of the United States has jurisdiction over this matter pursuant to 28 U.S.C. §1257 (3). This statute states in pertinent part that the Supreme Court is authorized to review certain state court decisions by writ of certiorari "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States...". It is axiomatic that a federal question must be present before the Supreme Court can assume jurisdiction under this statute. See Wright, Federal Courts, §107 (2d Ed. 1970).

While petitioner most assuredly has questioned the validity of Section 8 of the Metropolitan River Protection Act, Ga. Laws 1973, p. 128, et seq., as amended by Ga. Laws 1975, p. 837 (River Act), she has failed to raise any federal question whatsoever. Pope has presented this Court with three questions. Petition, pp. 2-3. The first and third of these questions merely state Mrs. Pope's contention that the Georgia statute constitutes a "taking" of her property without just or reasonable compensation in derogation of the Constitution of the State of Georgia. Petitioner does not assert that the River Act is repugnant to the Constitution, treaties or laws of the United States.

This is not surprising, however, in light of the fact that Mrs. Pope's complaint, originally filed in the Superior Court of Fulton County, Georgia, also fails to allege any violation of the Constitution or laws of the United States. Mrs. Pope did not

allege any violations of the United States Constitution in her Georgia complaint for the simple reason that the United States District Court for the Northern District of Georgia had already decided that the River Act did not constitute a "taking" of Mrs. Pope's property under the Fifth and Fourteenth Amendments to the United States Constitution in a parallel case which was instituted by Mrs. Pope herself. Pope v. City of Atlanta, 418 F. Supp. 665 (N.D. Ga. 1976). That judgment was summarily affirmed without opinion by the United States Court of Appeals for the Fifth Circuit. Pope v. City of Atlanta, 575 F.2d 298 (5th Cir. 1978).

The opinion of the Supreme Court of Georgia in Pope's first state court appeal, Pope v. City of Atlanta, 240 Ga. 177, 240 S.E.2d 241 (1977), makes manifest the fact that no federal issues were raised by Mrs. Pope with respect to her Georgia action.

"Mrs. Pope brought suit in the federal district court claiming the statute was unconstitutional on federal grounds. That case was dismissed. She then brought this suit in the state court asserting the state constitutional grounds that the Act violated her state due process and eminent domain rights, 1976 Const., Art. I, §1, para. 1; Code Ann. §2-101; Art. I, §3, para. 1; Code Ann. §2-301...The trial court ruled in our case...that the state due process and eminent domain grounds were barred by res judicata by the litigation of the federal due process grounds in the federal court." 240 SE2d at 242.

In deciding the res judicata issue the Supreme Court of Georgia went on to hold as follows:

"The trial court erred in holding that the federal court litigation was res judicata of the state due process and eminent domain grounds. Questions

of the construction of the State Constitution are strictly matters for the highest court of this State. The construction of similar federal constitutional provisions, though persuasive authority, is not binding on this State's construction of its own Constitution. (footnote and citations omitted)...Therefore, we conclude that Mrs. Pope's state constitutional claims here are separate from her federal constitutional claims." 240 S.E.2d at 242-243 (Emphasis supplied).

Finally, the court decided: "Therefore, now that these important state issues are before the state courts, we will not apply our res judicata statute to bar this litigation." 240 S.E.2d at 243 (Emphasis supplied).

Even a cursory reading of the second decision of the Supreme Court of Georgia, which is the subject of Pope's petition, discloses that the case was decided on state principles of law exclusively. No reference to the United States Constitution may be found. The only federal cases discussed are Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922) and Pumpelly v. Green Bay Company, 80 U.S. 166, 20 L. Ed. 557 (1871). These cases were distinguished from Pope's only because of her heavy reliance upon them. The court's opinion, however, is not based upon them.

The Supreme Court of the United States has long held that where a state court rests its decision on both state and federal grounds, either of which would be dispositive, the court has no jurisdiction. Fox Film Corporation v. Muller, 296 U.S. 207, 56 S. Ct. 183 (1935); Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 37 S.Ct. 318 (1917). The case at bar, however, rests not on adequate and independent state grounds, but rather on

state grounds alone. Significantly, Pope herself asserts that "The real issue is whether the River Protection Act, as drawn, violates the Georgia Constitution." Petition, p. 7. Respondent ARC agrees.

The second question presented by Pope (Petition, p. 2) is easily disposed of. The distinction between the purchase of land to be used for a federal park and the restriction upon the use of a portion of a landowner's property is obvious. Moreover, the Chattahoochee National Recreation Area Act (Pub. L. 95-344) has been raised by Pope for the first time in this case in her petition to this court. This is insufficient for jurisdictional purposes. Worthy v. Barrett, 76 U.S. 611, 9 Wall. 611 (1870); see Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161 (1969). Indeed, this issue appears to have been raised for the sole purpose of giving this Court jurisdiction where, in fact, none exists.

II. This Case Is Controlled By A Recent Decision of The Supreme Court Of The United States.

Even if the Court is of the opinion that it has jurisdiction of this case, the Court should nevertheless dismiss the petition for a writ because the instant case is clearly controlled by this Court's recent decision in Penn Central Transportation Co. v. City of New York, _____ U.S. _____, 46 L. Week 4856 (June 26, 1978). There, the Landmarks Preservation Commission, acting under New York City's Landmarks Preservation Law, rejected Penn Central's proposal for the construction of a multi-story office building over the Grand Central Terminal. The issue before the Supreme Court was whether the Landmarks Preservation Law, as applied to Penn Central's property, constituted a "taking" of said property without the payment of just compensation in violation of the Fifth and

Fourteenth Amendments. The Court held that the law was valid despite the fact that "the Act imposes a duty upon the owner to keep the exterior features of the building 'in good repair' to assure that the Act's objectives not be defeated by the landmarks falling into a state of irremediable disrepair." 46 L. Week at 4860.

After acknowledging the difficulties which the Court had encountered in deciding previous "taking" cases, the Court indicated that the economic impact on the property owner and the character of the governmental action are important factors to consider. 46 L. Week at 4873. The Court then stated its position thusly:

"More importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests. See Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)." 46 L. Week at 4874.

The case at bar represents just such an instance. The stated and obvious purposes of the River Act are the protection of the public water supply serving the metropolitan Atlanta area and the control of flooding, erosion and pollution. River Act, §3(a). That the River Act promotes the health, safety and general welfare cannot seriously be questioned. Further, the economic impact of the statute on Pope is, at best, negligible. Pope has not alleged, much less proved, a diminution in the value of her property on account of the River Act; in fact, it may well be argued that her property is enhanced by the protection afforded by this statute. In addition, the governmental interference with the Pope property is not in the form of a

physical invasion; neither is Pope burdened with any particular upkeep requirements as in Penn Central or Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975).

The Supreme Court in Penn Central, after upholding the Landmarks Preservation Law generally, focused on the impact of that law as applied to the Grand Central Terminal. The Court had little difficulty in deciding that the New York City law did not interfere with the claimant's "primary expectation concerning the use of the parcel." 46 L. Week at 4885. Neither does the River Act interfere with Pope's primary expectation with respect to her land; that is, its use as a residential lot.

"'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely aggregated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole..." 46 L. Week at 4879.

In light of the Court's decision in the Penn Central case, review of the case at bar is not warranted.

III. Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the within and foregoing Brief In Opposition To Petition For Writ Of Certiorari by depositing copies of same in the United States mail with sufficient first class postage prepaid to the following counsel of record for all parties:

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This 2nd day of February, 1979.

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